SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS, Petitioner, v. COUNTY OF ORANGE, et al., Respondents.	Case 30-2019-01043706-CU-JR-CJC ORDER

ORDER

Petitioner Association of Orange County Deputy Sheriffs' motion for preliminary injunction came regularly for hearing on February 7, 2019. The court heard argument and took the matter under submission. Having considered all of the briefing and argument, and good cause having been shown, the court now rules.

- The request for a preliminary injunction is denied.
- This order is stayed and the temporary restraining order remains in effect until March 15, 2019, to allow petitioner to seek writ relief from the Court of Appeal. To maintain the TRO, petitioner shall post forthwith a $50,000 bond or undertaking in favor of the intervenors.
- All further litigation is stayed pending further order.
- The court sets a status conference for March 14, 2019 at 2 pm in Dept. C15 to consider the anticipated course of the litigation and the appropriate duration of the stay.

This is the order of the court. Petitioner shall give notice.

Dated: February 28, 2019

Judge Nathan Scott
Orange County Superior Court

BACKGROUND

Our Legislature passed Senate Bill 1421 to provide access to peace officer records relating to:

- investigations into firearm discharges
- uses of force resulting in death or great bodily injury
- findings of sexual assault
- findings of officer dishonesty in investigating crimes or reporting officer misconduct.

The law became effective January 1, 2019.

The Association requests a preliminary injunction barring the County from disclosing any such records "reflecting incidents or conduct occurring before January 1, 2019."[1]

The court denies the request. The Association is not the proper party to seek an injunction. The County is not doing what the injunction would stop. SB 1421 is not as narrow as the Association asserts. And the balance of harms does not favor an injunction.

ANALYSIS

"'In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction.' [Citation.] '"Generally, the ruling on an application for preliminary injunction rests in the sound discretion of the trial court."'" (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1449-1450 (*Whyte*).)

Factor #1, Probability of Prevailing. The Association fails to show a sufficient probability of prevailing on the merits. Three problems stand out.

First, the Association is not the proper party to seek this injunction. The Association seeks the injunction to protect its members' privacy rights. All of the Association's claims stem from an officer's right to privacy. But that right is personal – it belongs to the individual officers. "[A]ny privacy right in the information contained in [records] belongs to the deputies (and their employer . . .),

[1] For ease of reading, the court will refer to the petitioner as the Association, the respondents collectively as the County, the intervenors as the media, Senate Bill 1421 as SB 1421, and peace officers and custodial officers collectively as officers. All statutory references are to the Penal Code.

not to the deputies' labor union. 'It is well settled that the right to privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded.'" (*Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th 808, 821.) A union could not enjoin the LA Times from publishing deputy sheriffs' employment applications; it lacked legal standing. (*Ibid.*) So too does the Association.

Second, the County is not doing what the Association seeks to enjoin. The Association has not shown the County has produced or will produce any SB 1421 records. The County is trying to stay agnostic on the issue, saying it is not taking any position at all – but it is not producing any records, either. There is no point issuing an injunction to stop the County from doing something it has not yet done, is not now doing, and does not immediately intend to do. (See *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084.)

Specifically, the California Supreme Court has barred ***agencies*** from obtaining a preemptive injunction. (See *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 423 (*Filarsky*).) The California Public Records Act provides custom-made, streamlined procedures so agencies can process requests "expeditiously." (*Id.* at p. 427.) An agency cannot avoid this expedited process by running to court first to get an injunction against disclosing records. (*Id.* at p. 429.)

Issuing preemptive injunctions to ***affected individuals*** might make sense, but "only when the public agency agrees to provide the requested records without judicial intervention." (*Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1265-1267 & fn. 13 (*Marken*).) There is no such agreement here.

Because the County is not poised to produce anything, the next move belongs to anyone who is requesting SB 1421 records. If the County denies the request, then the requester may seek a court order requiring the County to produce the records. (See *Marken*, *supra*, 202 Cal.App.4th at p. 1267, fn. 13.) Any individual officer affected by the disclosure could then intervene in ***that*** action. (*Ibid.*) That's not ***this*** case.

Third, SB 1421 became "effective" on January 1, 2019, in a broader sense than the Association suggests.

The Association contends any record "reflecting incidents or conduct occurring before January 1, 2019" is still confidential, despite SB 1421. It asserts that even records created ***after*** January 1, 2019 cannot be disclosed if they refer to incidents that occurred before then.

This raises a question of statutory interpretation. The "'"fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." [Citation.] "Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose."'" (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616-617 (*City of San Jose*).

A statute is not necessarily ambiguous just because "both sides . . . argue that the plain meaning of the statutory language supports their position." (*People v. Cole* (2006) 38 Cal.4th 964, 975 (*Cole*).) That "often happens in cases involving statutory interpretation." (*Ibid.*)

Nothing in the plain language of the statute suggests the Legislature intended to exclude records relating to pre-2019 incidents. SB 1421 amended Section 832.7 to provide in part: "Notwithstanding . . . any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act . . . ." It then lists the types of disclosable documents – those regarding firearm discharges, serious uses of force, and findings of sexual assault or officer dishonesty. There is no date restriction at all. There is no reference to when the underlying incidents occurred. It just says the records "shall be made available."

If the Legislature intended to make the records "available for public inspection" – but ***not*** if they mentioned anything before 2019 – the Legislature would have said so. "Had the Legislature intended to create [that] broad exemption" from disclosure, it would have used "more specific" statutory language. (*Cole*, 38 Cal.4th at p. 979.)

An exemption for records discussing pre-2019 conduct does not make sense "in the context of the statutory framework as a whole." (*City of San Jose, supra,* 2 Cal.5th at p. 616.) The statute defines "record" to include a series of documents created over time: interview transcripts, investigative reports, findings, recommendations, disciplinary actions. (§ 832.7, subd. (b)(2).) And the statute defines "sexual assault" and "dishonesty" to include conduct that might unfold over time. (§ 832.7, subds. (b)(1)(B)(ii), (C).) A request for SB 1421 records can reasonably cover documents and conduct spanning years. But under the Association's interpretation, a request made years after 2019 for records created years after 2019 would stall if the timeline of events in the records reached back to 2018, as it easily could. That cannot be what the Legislature intended.

If public agencies could withhold records referring to any pre-2019 conduct, they would have an incentive to shoehorn old facts into them. The California Supreme Court has twice held the Legislature did not intend to give agencies the unilateral ability to manufacture confidentiality. It held it "unlikely 'the Legislature intended that a public agency be able to shield information from public disclosure simply by placing it in' a certain type of file." (*City of San Jose, supra,* 2 Cal.5th at p. 624.) And it found "no indication the Legislature meant to allow public officials to shield communications about official business simply by directing them through personal accounts." (*Ibid.*) Similarly, nothing in SB 1421 suggests the Legislature intended to give agencies such a simple expedient for shielding records. Statutes must be read to avoid "absurd consequences the Legislature did not intend." (*Id.* at p. 616.)

Rejecting the Association's interpretation does not make SB 1421 improperly retroactive.

It is not clear anything about SB 1421 is retroactive. It appears to apply prospectively to the procedures for requesting the records – they "shall be made available for public inspection pursuant to the California Public Records Act" (§ 832.7, subd.(b)(1)), which sets forth its expedited disclosure

procedure. "If the statute governs only procedure that is to be followed in cases subsequent to the enactment of the statute, the statute is prospective." (*Lozano v. Workers' Compensation Appeals Board* (2015) 236 Cal.App.4th 992, 999; accord *People v. Superior Court* (2018) 6 Cal.5th 457, 465-466 [new disclosure law applies to existing records]; *People v. McClinton* (2018) 29 Cal.App.5th 738, 753 [same].)

And releasing SB 1421 records does not impermissibly violate any vested right. An officer's right to privacy in personnel records is far from absolute; the law already sets a "'relatively low threshold for discovery.'" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 [discussing disclosures pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531].) "[T]he information in an officer's personnel file is *conditionally* privileged by statute [citation], but that privilege must be weighed against the defendant's legitimate interests in obtaining the requested information." (*Rezek v. Superior Court* (2012) 206 Cal.App.4th 633, 643.) Moreover, an officer's limited privacy right over personnel records does not necessarily prevent disclosure of the underlying information if it is obtained through other sources. SB 1421 applies to records of incidents that involve other people – victims and witnesses of firearm discharges, uses of force, sexual assault, dishonest investigations, and officer misconduct. The victims and witnesses have never been under any obligation to keep their experiences secret. Thus, 'it is not clear why [the Association] assume[s]" the records and underlying information "would necessarily remain forever confidential." (*People v. Superior Court*, *supra*, 6 Cal.5th at p. 466.)

To what records does SB 1421 apply? The plain language of Section 832.7 states that the designated "records and records maintained by any state or local agency . . . shall be made available for public inspection." That shows a legislative intent to disclose ***at least*** records created after the effective date. The media contends SB 1421 goes further to disclose all records existing (or "maintained") after the effective date. At least one union might agree. The Los Angeles County Professional Peace Officer Association alerted the Legislature that "notwithstanding that the officer's conduct was entirely in policy, his or her records are available for public inspection irrespective of

whether or not they occurred prior to the effective date of SB 1421."[2] (1/16/19 Levine Decl., Ex. A, p. 16 [Senate Committee on Public Safety analysis].) A final decision on this issue must await the end of this case. The Association is seeking a preliminary injunction "'*prior to a full adjudication of the merits of its claim.*'" (*Marken, supra*, 202 Cal.App.4th at p. 1260.) At this early stage, it is sufficient to conclude the Association has not shown SB 1421 means what it thinks it means.

Factor #2, Relative Interim Harms. Whatever its probability of prevailing, the Association has failed to show the relative interim harms merit a preliminary injunction.

It is easy to identify the competing harms. The harm to the Association from wrongly denying the injunction is the potential release of records that should not be released. The harm to the media from wrongly granting the injunction is the withholding of records that should be released.

The harm to the Association of wrongly disclosing records is hard to quantify. It is unknown how many records will be requested or disclosed.

Importantly, it is unknown what information will actually become public. SB 1421 still has many levels of protection against disclosing harmful information. SB 1421 allows agencies to withhold records regarding active investigations or frivolous complaints. (§ 832.7, subd. (b)(7), (8).) It allows agencies to redact personal, medical and financial information. (§ 832.7, subd. (b)(5)(A), (C).) It allows agencies to preserve the anonymity of witnesses and persons filing complaints. (§ 832.7, subd. (b)(5)(B).) It allows agencies to redact information that poses a danger to an officer or anyone else. (§ 832.7, subd. (b)(5)(D).) And it allows agencies to redact any information if the public interest in withholding it outweighs the public interest in disclosing it. (§ 832.7, subd. (b)(6).)

It is also unknown whether any released information will actually harm the officer. The information might already be public or become public through other sources. And individual officers may or may not object to the release of the information. Their rights to privacy are, after all, personal to each one of them.

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[2] Opposition statements included in legislative history show the Legislature fully understood the consequences of a new law. (See *Delaney v. Baker* (1999) 20 Cal.4th 23, 36-37; *Hellinger v. Farmers Group, Inc.* (2001) 91 Cal.App.4th 1049, 1058-1059.) "[L]egislative history materials may be properly considered to confirm or bolster a court's interpretation of an unambiguous statute." (*PacificCare of California v. Bright Medical Associates* (2011) 198 Cal.App.4th 1451, 1463, fn. 5.)

The harm to the media of wrongly withholding records is also hard to quantify. It is unknown how many requests would be denied, or whether the information in the records might be otherwise disclosed. Of the records that are wrongly withheld, it is unknown what specific effect that would have on the media or the public. (Cf. *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 219 (*Caldecott*) [reporters seek information to share with the public].)

But the nature of the harm is easily stated: "'Openness in government is essential to the functioning of a democracy. "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process."'" (*Marken, supra*, 202 Cal.App.4th at p. 1261.) In particular, "there is a strong public policy in assessing" how our public servants handle "serious misconduct allegations." (*Caldecott*, supra, 243 Cal.App.4th at p. 223.)

While it is hard to quantify the competing harms, the Association has the burden to show they tilt toward issuing the injunction. (See *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.) This, it has failed to do.

Requests for Judicial Notice. The Association attached SB 1421's legislative history to a declaration. The court deems this a request for judicial notice. It is granted. "Committee materials are properly consulted to understand legislative intent, since it is reasonable to infer the legislators considered explanatory materials and shared the understanding expressed in the materials when voting to enact a statute." (*Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 478 [quotation marks omitted]; accord *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-37 (*Kaufman*).)

The media's request to take judicial notice of Senator Skinner's letter is denied. An individual legislator's "opinion issued after [the] adoption of [a] statute [was] obviously not considered by [the] Legislature before passing [the] bill." (*Warmington Old Town Associates v. Tustin Unified School District* (2002) 101 Cal.App.4th 840, 854; accord *Kaufman, supra,* 133 Cal.App.4th at pp. 37-38.)

All requests to take judicial notice of other trial court decisions are denied. Trial courts are bound by the U.S. and California Supreme Courts and the Court of Appeal, not by each other. (See *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

TRO. The Association asked at oral argument for the court to stay any denial of its request while it appeals. The court will stay its order and extend the TRO briefly to allow the Association to seek writ relief from the Court of Appeal. But the court will now require a bond or undertaking. (See *South San Francisco v. Cypress Lawn Cemetery Assn* (1992) 11 Cal.App.4th 916, 920, 922-923.)